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State Regulation of Federally Chartered Financial Institutions: Washington's Anti-Redlining Act

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STATE REGULATION OF FEDERALLY CHARTERED FINANCIAL INSTITUTIONS: WASHINGTON'S ANTI-REDLINING ACT

I. INTRODUCTION

In 1977, Washington joined the small but growing number of jurisdictions which have enacted "anti-redlining" laws.[1] The term "redlining"[2] graphically describes the practice of denying mortgage or home improvement loans or demanding more onerous terms[3] for such loans based solely on the location of the mortgaged home.[4] Because the ur-

1. Financial Institutions Disclosure Act—Fairness in Lending Act, ch. 301, 1977 Wash. Laws 1111 (codified at WASH. REV. CODE ch. 19.106 & §§ 30.04.500-.515 (Supp. 1977)). See notes 19-41 and accompanying text *infra* for a description of the act. The federal government and several other states and cities have also enacted laws or regulations intended to eliminate redlining. *See* notes 42-57 (federal law) & 58-66 (state laws) and accompanying text *infra*. *See generally* Ryan, *Banking Law*, 1977 ANN. SURVEY AM. L. 57 (survey of anti-redlining measures). The vast amount of testimony and material presented to the Senate committee considering the federal Home Mortgage Disclosure Act underscores the depth of community concern about the problem of redlining. *See Home Mortgage Disclosure Act of 1975: Hearings on S. 1281 Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 1st Sess. (Parts 1 & 2) (1975) [hereinafter cited as *Senate Hearings*].

2. The term derives from the apocryphal practice of mortgage lenders drawing red lines around designated "no loan" areas on city maps. Note, *Redlining—The Fight Against Discrimination in Mortgage Lending*, 6 LOY. CHI. L.J. 71, 72 (1975).

3. Variances from standard mortgage terms include requiring higher down payments, imposing higher interest rates, using shorter repayment periods, or charging discount points. *See, e.g., Senate Hearings, supra* note 1, at 35 (prepared statement of Gov. Walker of Illinois); Duncan, Hood, & Neet, *Redlining Practices, Racial Resegregation, and Urban Decay: Neighborhood Housing Services as a Viable Alternative*, 7 URB. LAW. 510, 513-14 (1975).

4. *E.g., Senate Hearings, supra* note 1, at 1-2 (opening statement of Committee Chairman, Senator Proxmire); Note, *Attacking the Urban Redlining Problem*, 56 B.U. L. REV. 989 (1976) [hereinafter cited as *Attacking Urban Redlining*]. The majority of discussions of redlining in the legal literature conclude that redlining is a severe problem not adequately addressed by existing legislation. See note 17 *infra* for a partial list of recent commentaries. One author, however, has argued that "redlining" by mortgage lenders is not a primary cause of neighborhood decline and urban decay but only a prudent money-management response to areas posing high risks due to other factors and therefore, that inflexible anti-redlining and disclosure laws are unwise. Van Alstyne, *Redlining—The Cure Worse than the Illness*, 3 J. CONTEMP. L. 264, 266, 270-71 (1977). *But see* Note, *The Home Mortgage Disclosure Act of 1975: Will It Protect Urban Consumers from Redlining?*, 12 NEW ENGLAND L. REV. 957, 958-63 (1977) [hereinafter cited as *HMDA Urban Consumer Protection*].

Lending institutions undeniably feel they are obligated to protect their depositors' and shareholders' interests against unduly risky investments. *See, e.g., Attacking Urban Redlining, supra* at 991.

Urban redlining focuses upon the relationship between mortgage risk and the loca-

ban neighborhoods subject to redlining generally have significant minority populations, and because the mortgage applicants denied credit are frequently members of minority groups, strictly geographic redlining often becomes part of the larger problem of mortgage discrimination based on race.[5] Racial redlining can be attacked on the basis of fair housing laws or other civil rights legislation.[6] In geographic redlining, however, race may not be a factor,[7] or if it is a fac-

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tion of the collateral. When a lender redlines a neighborhood, it determines that the characteristics of the neighborhood render default unacceptably probable and that the subsequent sale of the property will not yield a price at least equal to the loan's outstanding balance. Lenders rely on this determination regardless of the credit standing of the potential borrower or the condition of the building offered as collateral.

Id. at 993. Since mortgage loans are typically long term, there is an incentive for the lender to leave a large margin of error when estimating the probability of default or substantial depreciation in property value. *See generally* Ryan, *supra* note 1, at 58; Comment, *Redlining in Mortgage Lending: California's Approach to Getting the Red Out*, 8 PAC. L.J. 699, 729-30 (1977).

Whether redlining is the initiating cause of neighborhood decline or merely an effect thereof, it still may justly be attacked. For redlining in response to what are perceived as the first signs of decline nevertheless contributes to the decline and indeed renders it inevitable: without money to finance renovation and purchases by new residents, neighborhoods deteriorate. *See, e.g., Attacking Urban Redlining, supra* at 1005-06.

A recent study seriously challenges the methodology of previous empirical studies of redlining, thus casting doubt upon the prevailing assumption that geographic redlining is a serious problem. G. Benston, The Anti-Redlining Rules: An Analysis of the Federal Home Loan Bank Board's Proposed Nondiscrimination Requirements 8-9 (1978) (Law and Economics Center, Univ. of Miami). Professor Benston also reports the findings of a study of redlining in Rochester, New York, designed to avoid the methodological flaws of earlier work. Those findings do not support the claim that there is extensive mortgage discrimination based on the age and/or location of the house. *Id.* at 11-13. *See also* Clark, *Regulating Redlining*, Wall St. J., Dec. 26, 1978, at 6, col. 3. The FHLBB's nondiscrimination regulations are discussed in notes 46 and 151 *infra*.

5. Denial of mortgages because of location (redlining) should also be distinguished from "mortgage disinvestment," which refers to the transfer of capital from areas where it is collected to different areas for investment. Money collected by savings deposits in area A is not reinvested in mortgages in area A but disinvested to area B where the return is thought to be higher and/or safer. *See, e.g., Attacking Urban Redlining, supra* note 4, at 996-97.

6. *See, e.g.*, Harrison v. Otto G. Heinzeroth Mortgage Co., 430 F. Supp. 893, 896 (N.D. Ohio 1977) (plaintiffs alleging racial redlining as basis for denial of mortgage prevailed under 1968 Fair Housing Act); Laufman v. Oakley Bldg. & Loan Co., 408 F. Supp. 489, 493 (S.D. Ohio 1976) (white applicants denied mortgage solely because house was in a racially integrated area have a cause of action under the 1968 Fair Housing Act §§ 804 & 805, as amended 42 U.S.C. §§3604, 3605 (1976)).

7. *Attacking Urban Redlining, supra* note 4, at 990. The factors which mortgage appraisers use include nonracial ones such as the age of the house, crime rate, and characteristics of neighboring areas. *Id.* at 994-95. Moreover, redlining is not confined only to the poorest neighborhoods; working class and middle income areas can also be affected. *Id.* at 990.

tor, it is difficult to establish. But even apart from its racially discriminatory impact, redlining is socially harmful and should be subject to legal remedy because it contributes to the deterioration of neighborhoods by denying mortgage credit in specific areas.

Prohibition of discrimination based on location and public disclosure of mortgage information have been believed to be effective measures against redlining. Thus, in the Financial Institutions Disclosure Act and the Fairness in Lending Act of 1977,[8] the Washington State legislature prohibited redlining[9] and provided for disclosure of mortgage data to the secretary of state and to the public.[10] These provisions were expressly made applicable to federally chartered financial institutions within the state as well as to state chartered institutions.[11]

It is long settled that the federal government has paramount authority over federally chartered financial institutions.[12] *McCulloch v. Maryland*[13] established this rule for national banks. Federal savings and loan associations have similar status.[14] Constitutionally derived limits, therefore, are imposed on state legislation affecting federally chartered financial institutions.[15] Washington's anti-redlining statute may have overstepped those limits; it recently was held inapplicable to federal savings and loan associations in *Washington Savings League v. Chapman*.[16]

8. Financial Institutions Disclosure Act—Fairness in Lending Act, ch. 301, 1977 Wash. Laws 1111 (codified at WASH. REV. CODE ch. 19.106 & §§ 30.04.500–.515 (Supp. 1977)). See notes 19–41 and accompanying text *infra* for a description of the act. In this comment, "Financial Institutions Disclosure Act" is used to refer to the entire anti-redlining act in the session laws; "Mortgage Disclosure Act" refers to the disclosure provisions; and "Fairness in Lending Act" refers to the prohibition of redlining. *See* notes 19–22 and accompanying text *infra*.

9. WASH. REV. CODE § 30.04.510(1) (Supp. 1977).

10. WASH. REV. CODE §§ 19.106.030 & .050 (Supp. 1977).

11. WASH. REV. CODE §§ 19.106.020(3) & 30.04.505(1) (Supp. 1977).

12. *E.g.*, Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896).

13. 17 U.S. (4 Wheat.) 316 (1819).

14. *E.g.*, United States v. Harper, 241 F.2d 103, 105 (7th Cir. 1957); Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 718 (E.D. Pa. 1963); California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 318–19 (S.D. Cal. 1951).

15. National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869) (state laws which infringe the national banking laws or impose an undue burden on the performance of the banks' functions are impermissible).

16. Washington Sav. League v. Chapman, No. C 78-163S (W.D. Wash., Jan. 17, 1979) (order granting motions for summary judgment and permanent injunction). The magistrate's earlier recommendation and the order granting preliminary injunction are reprinted in 44 LEGAL BULL. 290–92 (1978). In *Washington Savings League* a group of federal savings and loan associations in the state of Washington and their trade association challenged, on the basis of federal preemption, the validity of the application of the

The purpose of this comment is to analyze the law on state regulation of federal financial institutions and then to apply that analysis to the Washington act in order to determine whether the act can validly be applied to national banks and federal savings and loan associations.[17] Part II critically describes the Washington act and compares

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state anti-redlining law to them and sought to enjoin the secretary of state and the attorney general from enforcing it against federal associations. The court held that federal law and regulations did preempt and that accordingly the state act was inapplicable to federal savings and loan associations. *See* notes 137 & 153 *infra*.

Long before suit was filed, the Office of the General Counsel of the Federal Home Loan Bank Board (FHLBB), the federal regulatory agency for federal savings and loan associations, sent an opinion letter to the Washington Savings League, stating that "the statute as a matter of federal law does not apply to federally-chartered S & L's." Letter from Daniel Goldberg, Acting General Counsel, to Robert L. Shults, President, Washington Savings League at 1 (July 22, 1977) (copy on file with *Washington Law Review*). Consider a similar New Jersey letter cited in note 66 *infra*. The FHLBB's letter prompted enough community concern to lead *The Seattle Times* editorially to question the FHLBB's view and to urge federal institutions to comply with the state measure. Seattle Times, Dec. 30, 1977, at A12, col. 1. Immediately before suit was filed, the state attorney general's office issued a letter opinion stating that the state disclosure act is constitutionally applicable to federal institutions. AGLO 1978 No. 2, at 1 (Feb. 14, 1978).

17. This comment will not duplicate areas already treated. Recent discussions of redlining in the legal literature have described redlining practices and their impact on urban areas and surveyed possible responses by lending institutions and the legal system. *See, e.g.*, Earthman, *Residential Mortgage Lending: Charting a Course through the Regulatory Maze*, 29 VAND. L. REV. 957 (1976); Givens, *The "Antiredlining" Issue: Can Banks Be Forced to Lend?*, 95 BANKING L.J. 515 (1978); Renne, *Eliminating Redlining by Judicial Action: Are Erasers Available?*, 29 VAND. L. REV. 987 (1976); Siebert, *Urban Investment Problems: How Banking Institutions and Supervisory Agencies Can Help*, 95 BANKING L.J. 444 (1978); Wisniewski, *Mortgage Redlining (Disinvestment): The Parameters of Federal, State, and Municipal Regulation*, 54 U. DET. J. URB. L. 367 (1977); Comment, *The Legality of Redlining Under the Civil Rights Laws*, 25 AM. U.L. REV. 463 (1976); Note, *FHA "Redlining"—Inflexible Agency Guidelines Defeat Congressional Intent for the 223(e)"Acceptable Risk" Program*, 19 ARIZ. L. REV. 919 (1977); Note, *Attacking the Urban Redlining Problem*, 56 B.U. L. REV. 989 (1976); Note, *Urban Housing Finance and the Redlining Controversy*, 25 CLEV. ST. L. REV. 110 (1976); Note, *Redlining: Remedies for Victims of Urban Disinvestment*, 5 FORDHAM URB. L.J. 83 (1976); Comment, *Redlining: Why Make A Federal Case Out of It*, 6 GOLDEN GATE L. REV. 813 (1976); Note, *Redlining—The Fight Against Discrimination in Mortgage Lending*, 6 LOY. CHI. L.J. 71 (1975); Comment, *A Proposal for Eliminating Redlining: The Missouri Financial Institutions Disclosure Act of 1976*, 20 ST. LOUIS L.J. 722 (1976); Comment, *Mortgage Discrimination—Eliminating Racial Discrimination in Home Financing through the Fair Housing Act of 1968*, 20 ST. LOUIS L.J. 139 (1975). *See also* Ryan, *supra* note 1 (descriptive survey of state and federal legislation on redlining); Note, *An Analysis of the Effectiveness of the Home Mortgage Disclosure Act of 1975*, 28 CASE W. RES. L. REV. 1074 (1978); Note, *The Home Mortgage Disclosure Act of 1975: Will it Protect Urban Consumers from Redlining?*, 12 NEW ENGLAND L. REV. 957 (1977) (describing and criticising HMDA, 12 U.S.C. § 2801 (1976)); Comment, *Red-lining and the Home Mortgage Disclosure Act of 1975: A Decisive Step toward Private Urban Redevelopment*, 25 EMORY L.J. 667 (1976); Comment, *Redlin-*

it with federal law on the same subject. Part III surveys the judicially developed limits on state regulation of federal financial institutions. Part IV then considers the validity of the Washington act as applied to federal financial institutions in light of the judicial limits discussed in Part III.[18] The comment concludes that the state prohibition of discrimination based on location is constitutionally applicable to national banks but is inapplicable to federal savings and loan associations. The comment further concludes that no federally chartered financial institution can be compelled to comply with the mortgage disclosure provision of the state act. Finally, a more limited version of the mortgage disclosure provision which may avoid constitutional infirmities is proposed.

II. STATE AND FEDERAL ANTI-REDLINING LAWS

A. Washington's Financial Institutions Disclosure Act

Although the entire anti-redlining law is contained in a single chapter of the session laws,[19] it contains two distinct parts which are intended to be treated separately.[20] The first part, requiring lending institutions to disclose information concerning their lending practices, will be referred to as the Mortgage Disclosure Act.[21] The second part,

ing in Mortgage Lending: California's Approach to Getting the Red Out, 8 PAC. L.J. 699 (1977) (describing exhaustive administrative disclosure regulations of California).

18. The Washington mortgage disclosure and redlining prohibition act is only one instance of the problem of states regulating federal financial institutions. The problem will recur as states continue to enact antidiscrimination and consumer protection laws with potential application to financial institutions. For example, Washington's Consumer Protection Act prohibits a variety of unfair practices and gives the state attorney general enforcement power. WASH. REV. CODE ch. 19.86 (1976). Although the law specifically exempts "actions or transactions permitted by any other regulatory body or officer acting under statutory authority of this state or the United States," WASH. REV. CODE § 19.86.170 (1976), it may in some circumstances apply to federal financial institutions. It is not self-evident that national banks and federal savings and loan associations are sufficiently under the regulatory aegis of their respective federal regulatory agencies to come within the exemption in all circumstances, *Cf.* State v. Reader's Digest Ass'n, Inc., 81 Wn. 2d 259, 279-80, 501 P.2d 290, 303 (1972), *appeal dismissed,* 411 U.S. 945 (1973). There, the Federal Trade Commission, which had permitted the Reader's Digest Sweepstakes under challenge by the state, was held not to be a "regulatory body" within the meaning of R.C.W. § 19.86.170; therefore the Sweepstakes did not qualify for an exemption and the state law applied, despite the Commission's permission.

19. Ch. 301, 1977 Wash. Laws 1111 (codified at WASH. REV. CODE ch. 19.106 & §§ 30.04.500-.515 (Supp. 1977)).

20. The separate codification in R.C.W., as directed by the Act, indicates this. Ch. 301, §§ 15-16, 1977 Wash. Laws 1115.

21. WASH. REV. CODE ch. 19.106 (Supp. 1977)). The short title is Financial Institu-

declaring discrimination in mortgage lending to be unlawful when based on the location of the home, will be referred to as the Fairness in Lending Act.[22]

1. Mortgage disclosure provisions

The Mortgage Disclosure Act requires each financial institution within the scope of the act to file reports containing specified information about the lender's mortgage loans in each covered neighborhood.[23] Institutions are subject to the act if they have a home office or branch within a standard metropolitan statistical area (SMSA).[24] A neighborhood is covered if it is wholly or partially within a SMSA.[25] The act is expressly applicable to federal institutions.[26] Each covered

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tions Disclosure Act. WASH. REV. CODE § 19.106.010 (Supp. 1977)). In this comment, however, "Financial Institutions Disclosure Act" is used to refer to the entire act in the session laws, and "Mortgage Disclosure Act" is used to refer to the disclosure provisions of R.C.W. ch. 19.106.

22. WASH. REV. CODE §§ 30.04.500-.515 (Supp. 1977)). The short title is the Fairness in Lending Act. WASH. REV. CODE § 30.04.500 (Supp. 1977)).

23. Mortgage disclosure is required on the theory that it will make members of the community conscious of the lending practices of area financial institutions and allow them to respond accordingly, for example, by not patronizing institutions which redline. This market pressure may encourage lenders to alter their behavior. *See HMDA Urban Consumer Protection, supra* note 4, at 976. Senator Proxmire gave a similar explanation of the purpose of the HMDA. 121 CONG. REC. 18882-83 (1975). One aspect of this rationale was incorporated into the text of the federal statute. 12 U.S.C. § 2801(b) (1976) (information disclosed will guide government officials' use of public funds and enable citizens to determine whether lending institutions are fulfilling community needs).

24. A SMSA is a county or group of contiguous counties containing at least one city of 50,000 or more, or one city of at least 25,000 which together with contiguous densely populated places has a combined population of 50,000 or more, provided the county or counties in which the city and surrounding places are located has a total population of at least 75,000. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 923 (98th ed. 1977). Washington has four SMSA's: Seattle-Everett (King and Snohomish counties), Tacoma (Pierce county), Spokane (Spokane county), and Yakima (Yakima county); in addition, Vancouver (Clark county) is part of the Portland, Oregon SMSA. *Id.* at 926-31.

25. WASH. REV. CODE § 19.106.030(1) (Supp. 1977). A "neighborhood" is an area designated by a census tract or by a ZIP code where there is no census tract designation. *Id.* § 19.106.020(6).

26. The statute defines "financial institution" as follows:

> "Financial institution" means any bank or trust company, mutual savings bank, savings and loan association or credit union which operates or has a place of business in this state *whether or not regulated by the state or federal government* and which has more than ten million dollars in assets, and any mortgage company which operates or has a place of business in this state.

Id. § 19.106.020(3) (emphasis added). The meaning of "whether or not regulated" is unclear because all of these institutions are regulated. The comparable provision of the

institution must file mortgage disclosure reports annually with the secretary of state on forms promulgated by the secretary.[27] The statements are to be available for public inspection and copying.[28] Failure to submit the required statement on time renders the lending institution liable to a fine.[29] The attorney general has power of enforcement for violations of the disclosure requirement.[30]

The information which lenders must include in these reports is extensive.[31] Under the state law, lenders must report for each covered neighborhood: (1) the number and aggregate amount of loans owned or serviced,[32] (2) the number and aggregate dollar amount of applica-

Fairness in Lending Act omits the "or not" language. WASH. REV. CODE § 30.04.505(1) (Supp. 1977). The minimum assets provision spares smaller institutions the burden of compiling reports. Small institutions nonetheless are prohibited from redlining since the Fairness in Lending Act does not contain a minimum assets provision. *Id.*

27. WASH. REV. CODE § 19.106.030(1), .040 (Supp. 1977). The provisions became effective July 1, 1977 and reports were due within 90 days after the end of each financial institution's fiscal year. Thus, for most institutions, the first deadline was March 31, 1978, for reports for the fiscal year ending December 31, 1977. For federal savings and loan associations, however, a preliminary injunction against enforcement took effect on March 30, 1978. Washington Sav. League v. Chapman, No. C 78-163S (W.D. Wash. March 30, 1978) (order granting preliminary injunction). *See* note 16 *supra* (final order in *Washington Savings League*).

28. The statements are to be available for public inspection at the secretary of state's office; the secretary is to provide copies to any interested person at cost. Each financial institution must have a copy of its statement available for inspection at each office within a SMSA. WASH. REV. CODE § 19.106.050 (Supp. 1977). Public access would be increased, and disclosure made more effective, if copies could be obtained directly from the institutions rather than the secretary's office and if there were a central location in each city where the disclosures, and therefore the redlining record, of the various institutions of that city could be compared. *Cf.* note 48 *infra* (public availability provisions of comparable federal act).

29. WASH. REV. CODE § 19.106.060(1) (Supp. 1977). The fine is $500 or $100 per day for each day overdue, whichever is greater. *Id.*

30. *Id.* This provision, in conjunction with the provision requiring institutions to file the reports with the secretary of state, *see* note 27 *supra,* is important in the context of federal financial institutions because it gives state officials a form of supervisory authority over the federal institutions. *See* notes 138–44 and accompanying text *infra.* Persons who knowingly file a false or misleading statement are guilty of a gross misdemeanor. WASH. REV. CODE § 19.106.060(2) (Supp. 1977).

31. The Washington Mortgage Disclosure Act requires much more extensive information than does the federal act. The federal Home Mortgage Disclosure Act of 1975 requires disclosure of only the number and total dollar amount of mortgage and home improvement loans originated or purchased in each geographic area. 12 U.S.C. § 2803(a)(1) (1976). *See* notes 51–52 and accompanying text *infra.* The data are also to be set out separately for each of several different categories of loans; the Washington act requires disclosure by several categories in addition to those required under federal law. *Compare* WASH. REV. CODE § 19.106.030(2) (Supp. 1977) *with* 12 U.S.C. § 2803(b) (1976).

32. WASH. REV. CODE § 19.106.030(1)(a)–(b) (Supp. 1977).

tions processed and rejected,[33] (3) the number and amount of loans closed,[34] and (4) the number of foreclosures and loans in default for the reporting period.[35]

2. *Fairness in lending provisions*

The Fairness in Lending Act[36] declares it "unlawful for any financial institution, in processing any application for a loan to be secured by a single-family residence to [deny] or vary the terms of a loan on the basis that a specific parcel of real estate offered as security is located in a specific geographic area . . . ."[37] Varying the terms of a loan includes such practices as demanding a greater down payment, imposing higher interest rates, or requiring a shorter repayment period than is usual.[38] The definition of financial institution in this act also expressly extends to federally chartered institutions.[39] The act's broad prohibition is severely qualified by a proviso stating that financial institutions may consider "sound underwriting practices in processing any application for a loan to any person."[40] Since lenders usu-

33. *Id.* § 19.106.030(1)(c). This is a key provision, for discriminatory redlining is more easily discerned by knowing the number of applications made but rejected in a particular area. The federal requirement of data disclosing only the aggregate number and amount of loans actually made is inadequate, since it fails to account for differences in level of demand for mortgages in different areas. *E.g.*, G. Benston, *supra* note 4, at 9. The federal HMDA does not require information about loan applications and rejections. *See* notes 51 & 52 *infra*.

34. WASH. REV. CODE § 19.106.030(1)(d) (Supp. 1977).

35. *Id.* § 19.106.030(1)(e)-(f). The information regarding foreclosures and loans in default will provide data which may resolve the argument that certain areas pose unacceptably high risks.

36. WASH. REV. CODE §§ 30.04.500-.515 (Supp. 1977).

37. *Id.* § 30.04.510(1). "Single-family residence" is not defined in the Fairness in Lending Act. It is defined in the Mortgage Disclosure Act as a residence of one to four dwelling units. WASH. REV. CODE § 19.106.020(8) (Supp. 1977).

Under the Fairness in Lending Act it is also unlawful to "[u]tilize lending standards that have no economic basis." WASH. REV. CODE § 30.04.510(2) (Supp. 1977). This is a requirement of great generality and indeterminate application.

38. WASH. REV. CODE § 30.04.505(3) (Supp. 1977). The strict prohibition of "varying the terms of the loan" raises interesting questions whether a government program to foster urban rehabilitation by charging lower interest rates, requiring no down payment, or using less stringent underwriting standards in designated urban neighborhoods would violate this law. Mortgage applicants in areas not selected for such programs may claim that they are being treated less favorably because of geographic location. Michigan's anti-redlining law implicitly recognizes this problem and expressly states that such programs are not in violation of the statute. *See* MICH. STAT. ANN. § 23.1125(4) (1978).

39. WASH. REV. CODE § 30.04.505(1) (Supp. 1977). *See* note 26 and accompanying text *supra*.

40. WASH. REV. CODE § 30.04.515 (Supp. 1977).

ally will contend that mortgages are denied in certain areas only because those areas have a higher risk and for other prudent economic reasons,[41] it is unclear to what extent the practices contemplated by the prohibition, as thus restricted, actually occur.

B. Federal Anti-Redlining Law

Concern over redlining and the lack of adequate mortgage credit in urban areas led Congress to enact the Home Mortgage Disclosure Act of 1975 (HMDA).[42] As the title indicates, the act requires disclosure of mortgage loan information.[43] It does not prohibit redlining.[44] This deficiency has been criticized,[45] and recently, the Federal Home Loan Bank Board, by amending its nondiscrimination regulations, has prohibited redlining by savings and loan associations.[46] Congress showed

41. For a summary of the rational economic considerations potentially involved, see G. Benston, *supra* note 4, at 2–4.

42. 12 U.S.C. §§ 2801–2809 (1976).

43. The theory of disclosure as a remedy is that with full information consumers (individual depositors or public officials with government deposits) will exert market pressure by depositing with institutions which make loans in the community and avoiding those which do not. *See* note 23 *supra*. This approach has been criticized as inadequate to solve the problems it addresses. *E.g., Attacking Urban Redlining, supra* note 4, at 1009; *HMDA Urban Consumer Protection, supra* note 4, at 984–86.

44. Where the mortgage denial is based on the racial characteristics of the neighborhood, other federal remedies are applicable. *See* note 6 *supra*. The Board of Governors of the Federal Reserve System asserts that the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1976), provides a cause of action for redlining victims if a mortgage applicant is discriminated against on the basis of the racial, religious, or ethnic characteristics of the neighborhood in which the property is located. [1976–1978 Transfer Binder] Pov. L. Rep. (CCH) ¶ 24,678 (summary of letter of June 24, 1977).

45. *See, e.g., HMDA Urban Consumer Protection, supra* note 4, at 987–88.

46. The Federal Home Loan Bank Board (FHLBB), the federal regulatory agency for federal savings and loan associations, amended its nondiscrimination regulations to include a prohibition of geographic redlining. Under the amended regulations, federal savings and loan associations are barred from denying mortgage loans because of the age of the dwelling or the neighborhood where located. 43 Fed. Reg. 22,332–39 (1978) (final amendments to 12 C.F.R. Parts 528 & 531). *See also* 42 Fed. Reg. 58,953–56 (1977) (proposed amendments to 12 C.F.R. Part 528 & § 531.8). Moreover, the Board expressly intends "that Federally-chartered savings and loan institutions shall be governed *solely* by these regulations." 43 Fed. Reg. 22,333 (1978) (emphasis added). For a discussion of the preemptive impact of these regulations, see notes 151–53 and accompanying text *infra*.

In a related area, the FHLBB, the Comptroller of the Currency, and the Federal Deposit Insurance Corporation, pursuant to a settlement agreement in a recent suit, agreed to intensify their monitoring of compliance with the Fair Housing Act by developing a computer based data-collection system including information about the race, sex, age, and marital status of applicants for housing loans and the location of the property. The information will be available to the public. National Urban League v. Office

further concern for the lack of credit available in some neighborhoods by enacting the Community Reinvestment Act of 1977,[47] which is intended to increase lending institutions' responsiveness to community needs.

The disclosure format of the HMDA is similar to that of the Washington act. Mortgage lenders are required to compile and make available to the public certain information about their lending activity.[48] Lenders covered by the HMDA are state and federal financial institutions with home or branch offices within a SMSA which make "federally related mortgage loans."[49] Institutions with assets of ten million dollars or less are exempt.[50]

The most important difference between the Washington act and the

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of the Comptroller of the Currency [1971-1978] EQUAL OPP. HOUSING REP. (P-H) ¶¶ 18,012 & 18,018 (D.D.C. March 22, 1977 & Nov. 28, 1977) (consent decrees entered). The FDIC has issued final rules, applicable to all banks with deposits insured by the FDIC, setting forth the requirements of the new data-collection system. 43 Fed. Reg. 11,563-68 (1978) (to be codified at 12 C.F.R. Part 338); 43 Fed. Reg. 18,540 (effective date of FDIC rules delayed to July 3, 1978).

47. 12 U.S.C.A. §§ 2901-2905 (Supp. 1978). The act requires the federal regulatory agencies, with regard to the financial institutions under their respective jurisdictions, to assess each institution's record of meeting the credit needs of its entire community, including low and moderate income neighborhoods, and to take that information into account in evaluating applications for a charter, deposit insurance, branch authorization, office relocation, merger, and so on. The regulatory agencies have issued regulations implementing the act. *See* 43 Fed. Reg. 47,144 (to be codified at 12 C.F.R Parts 25, 228, 345 & 563e) (final regulations effective Nov. 6, 1978); 43 Fed. Reg. 29,918 (proposed regulations). *See generally* Dennis, *The Community Reinvestment Act of 1977: Defining "Convenience and Needs of the Community,"* 95 BANKING L.J. 693 (1978).

Other bills were introduced in the 95th Congress which would have expressly prohibited redlining but the bills died without action. H.R. 8451, 8464, 95th Cong., 1st Sess. (1977) (amendments to Equal Credit Opportunity Act); H.R. 8510, 95th Cong., 1st Sess. (1977).

48. The reports are to be available at the institution's home office and at one branch within each standard metropolitan statistical area in which the institution has offices. 12 U.S.C. § 2803(a)(1) (1976). The term "mortgage loans" here, as in the Washington act, also includes home improvement loans. *Id.* § 2802(1).

49. 12 U.S.C. § 2802(2) (1976). Pursuant to the HMDA, the Board of Governors of the Federal Reserve System issued implementing regulations. 12 C.F.R. Part 203 (1978) (Regulation C). These regulations define a "federally related" mortgage loan as (1) one made by an institution whose deposits are insured by a federal agency or which is regulated by any agency of the federal government, (2) one made, insured, or assisted in any way by various federal programs, or (3) one intended to be sold to any of the federal entities which dominate the secondary mortgage market. *Id.* § 203.2(d). These categories include all federal and most state institutions. For an explanation of the secondary mortgage, see Earthman, *Residential Mortgage Lending: Charting a Course through the Regulatory Maze,* 29 VAND. L. REV. 957, 973-78 (1976).

50. 12 U.S.C. § 2808 (1976). The Washington Mortgage Disclosure Act has a similar exemption. WASH. REV. CODE § 19.106.020(3) (Supp. 1977). *See* note 26 *supra.*

federal act lies in the more extensive information which must be disclosed under Washington law. The Washington Mortgage Disclosure Act requires information about mortgage applications, loans made, loans rejected, loans closed, and foreclosures and defaults occurring.[51] But the federal act requires disclosure of only the number and total dollar amount of mortgage loans originated or purchased in each census tract or ZIP code area,[52] with further itemization according to types of loans.[53] There are provisions for enforcement and penalties for violation.[54]

The federal act also contains a section detailing its relation to state disclosure laws.[55] In the case of state chartered institutions, the HMDA provides no relief from complying with state law except where state law is inconsistent with federal law.[56] State chartered institutions can be exempted from complying with the federal law, however, where the state disclosure requirements are substantially similar to the HMDA and are adequately enforced.[57] The application of this section in the case of federally chartered financial institutions is discussed in Part IV.

C. Similar Developments in Other States

The Washington act expressly applies to federal financial institutions in an area where federal legislation exists. A number of

51. *See* notes 31–35 and accompanying text *supra*.

52. 12 U.S.C. § 2803(a)(1)–(2) (1976).

53. 12 U.S.C. § 2803(b) (1976). The Washington act has several additional categories. WASH. REV. CODE § 19.106.030(2) (Supp. 1977).

54. 12 U.S.C. § 2804 (1976). Each of the various federal financial regulators is to enforce compliance by the institutions principally under that regulator. *Id.* § 2804(b).

55. 12 U.S.C. § 2805 (1976) (quoted in part at note 131 *infra*.)

56. 12 U.S.C. § 2805(a) (1976). More stringent state disclosure requirements are not to be considered inconsistent with regard to state chartered institutions.

57. 12 U.S.C. § 2805(b) (1976). Thus, a state chartered institution will normally have to comply with only one set of disclosure requirements. Where state requirements are substantially similar to federal requirements (*i.e.*, as strict or stricter), an exemption from federal requirements may be secured; otherwise the federal requirements prevail. Such exemptions have been given. *See e.g.*, [1971–1978] EQUAL OPP. HOUSING REP. (P-H) Vol. V, Bull. 16, at ¶ 16.3 (March 8, 1978) (New Jersey chartered institutions granted exemption); 43 Fed. Reg. 35, 394 (1978) (Connecticut chartered institutions granted exemption). Federally chartered institutions, however, cannot be granted an exemption from the HMDA. 12 U.S.C. § 2805(b)(1)–(2) (1976) (explained in H.R. CONF. REP. No. 94–726, 94th Cong., 1st Sess. 9-10, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2336 (quoted at note 135 *infra*)).

other states[58] and cities[59] also have adopted various anti-redlining measures. In at least three of those states, just as in Washington,[60] the applicability of the state anti-redlining laws to federally chartered financial institutions has been questioned.

In 1975 Illinois enacted an anti-redlining law which applied to federal financial institutions.[61] Application of the state act to federal institutions was challenged in the Illinois courts, and the act was found unconstitutional by the Illinois Supreme Court.[62] In California, a federal district court recently held that the state's Housing Financial Discrimination Act of 1977[63] could not be applied against federal

58. In addition to Illinois, California, and New Jersey, *see* notes 61-66 and accompanying text *infra*, Connecticut, Michigan, New York, and Ohio, among others, also have anti-redlining measures. CONN. GEN. STAT. ANN. Pub. Act No. 77-153 (App. 1978) (West) (not yet codified); MICH. COMP. LAWS §§ 445.1601-.1614 (MICH. STAT. ANN. § 23.1125 (Callaghan Supp. 1978)) (effective July 1, 1978); 3 N.Y. CODES, RULES, REGULATIONS, Supervisory Procedure G 107 (1977); OHIO REV. CODE ANN. § 1343.01 (Page Supp. 1977); OHIO AD. CODE ch. 1301: 1-7-01 (banks) & ch. 1301: 2-3 (savings and loan associations) (1977). *See generally* Ryan, *supra* note 1, at 77-81. New York also requires lenders who deny mortgage loans or approve them on terms substantially different from the norm to notify the applicant in writing of the reasons for the decision. N.Y. BANKING LAW §6-d (McKinney Supp. 1977). The New York legislature recently passed a bill specifically outlawing geographic discrimination in mortgage lending. Wall St. J., Dec. 11, 1978, at 40, col. 4.

59. Chicago and Cleveland ordinances are discussed in Ryan, *supra* note 1, at 82-83. City ordinances typically require anti-redlining pledges and disclosure from institutions seeking city government contracts or deposits. *See* Note, *Redlining—The Fight Against Discrimination in Mortgage Lending*, 6 LOY. CHI. L.J. 71, 78-79 (1975). Illinois law also includes such a pledge requirement. ILL. ANN. STAT. ch. 130, § 41a (Smith-Hurd Supp. 1978).

60. Washington Sav. League v. Chapman, No. C 78-163S (W.D. Wash. Jan. 17, 1979) (order granting motions for summary judgment and preliminary injunction). *See* note 16 *supra*.

61. ILL. ANN. STAT. ch. 95, §§ 201-208 (mortgage disclosure provisions) & §§ 301-307 (fairness in lending provisions) (Smith-Hurd Supp. 1978). Illinois has two other anti-redlining laws. One requires a pledge of no redlining in order to get state deposits. ILL. ANN. STAT. ch. 130, § 41a (Smith-Hurd Supp. 1978). The other forbids redlining in homeowners' insurance. ILL. ANN. STAT. ch. 73, § 767.22 (Smith Hurd Supp. 1978).

62. Glen Ellyn Sav. & Loan Ass'n v. Tsoumas, 71 Ill. 2d 493, 377 N.E.2d 1, 4 (1978), *cert. denied*, 99 S. Ct. 311 (1978). The Illinois court held that the federal Home Mortgage Disclosure Act preempted the state law in the area of mortgage disclosure from federal institutions and that, because of a nonseverability, "self-destruct" clause in the Illinois act, the entire Illinois statute was invalid.

63. CAL. HEALTH & SAFETY CODE §§ 35800-35833 (West Supp. 1978). This act is a comprehensive treatment of discrimination in housing and housing finance, not merely an anti-redlining law. *Id.* §§ 35810 (prohibiting discrimination based on geographic location of home), 35811 (prohibiting discrimination based on race, color, religion, sex, marital status, national origin, or ancestry), 35812 (racial, ethnic, religious, or national origin composition of neighborhood not to be factor in appraisal or financing), 35815 (implementing agency authorized to monitor and investigate lending patterns for

savings and loan associations.[64] New Jersey's anti-redlining law also purports to apply to federally chartered financial institutions.[65] The General Counsel's Office of the Federal Home Loan Bank Board issued an opinion letter stating that the state law is inapplicable to federal savings and loan associations in New Jersey because of federal preemption.[66]

The attempts by several state legislatures, including Washington's, to make their anti-redlining laws applicable to federal financial institutions, despite the consistent position of federal agencies that such state laws have been preempted, bespeak a need for clearer understanding of the bounds of state regulation of national banks and federal savings and loan associations.

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compliance). The act applies to *any* financial institution in the state. *Id.* § 35805(c). Earlier administrative regulations were apparently limited to state chartered savings and loan associations. 10 CAL. AD. CODE §§ 245 (prohibiting discrimination based on neighborhood characteristics unrelated to sound business practices), 242 (general disclosure requirements), 242.2(u) (use of disclosed data to monitor discrimination prohibition) (1976).

64. Conference of Fed. Sav. & Loan Ass'n v. Silberman, [1971–1978] EQUAL OPP. HOUSING REP. (P-H) ¶ 15,264 (E.D. Cal. Aug. 16, 1978). The court held that the FHLBB's exercise of its plenary regulatory power over federal savings and loan associations preempts the state anti-redlining legislation and that the plenary regulatory power of the FHLBB is not limited by the provisions of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691–1691f (1976), or the Home Mortgage Disclosure Act, 12 U.S.C. § 2801–2809 (1976). Since the court refers neither to the anti-redlining regulations of the FHLBB nor to any action of the FHLBB other than its opinion that the California act was not applicable to federal savings and loan associations, the basis of the court's decision may be that the FHLBB has exclusive power over federal associations and that the state can regulate federal savings and loan associations only if the FHLBB consents. *Cf.* notes 81, 85 & 116–125 and accompanying text *infra*. The court does not explain why the apparently contrary preemption provisions of the Equal Credit Opportunity Act (ECOA), 15 U.S.C. § 1691d(f) (1976) (state laws giving greater protection are not to be displaced by federal law), are not relevant, at least for matters directly within the scope of the ECOA. Of course, the FHLBB's promulgation of nondiscrimination regulations and express statement of preemptive intent with regard to those rules, *see* note 46 *supra*, would preempt state laws in the areas dealt with by the regulations. *See* notes 74–86, 120–21 & 124–25 and accompanying text *infra*. But the *Silberman* court's decision does not appear based on those specific regulations. *See* 44 LEGAL BULL. 287 (1978).

65. N.J. STAT. ANN. § 17: 16F (West Supp. 1978). The definition of covered financial institutions in the redlining law, *id.* § 17:16F–2a, incorporates by reference definitions in the Banking Law of New Jersey which include national banks and federal savings and loan associations. N.J. STAT. ANN. §§ 17:9A–1(2) & 17:12B–5(3) (West Supp. 1978).

66. The FHLBB supervises federal savings and loan associations. The March 21, 1977, opinion letter is reprinted in full in 43 LEGAL BULL. 140–45 (May 1977). This opinion is substantially similar to that received by the Washington Savings League regarding the applicability of the Washington act to federal associations. *See* note 16 *supra*.

III. STATE REGULATION OF FEDERAL FINANCIAL INSTITUTIONS

Because the federally chartered financial institutions principally involved in home mortgage lending are national banks and federal savings and loan associations,[67] this comment is limited to considering state regulation of those institutions.[68]

A. National Banks

The Supreme Court has observed that "[b]anking is one of the longest regulated and most closely supervised of public callings."[69] In the United States banks are regulated by the state and federal governments. This "dual banking system" has developed since the passage of the National Banking Acts during the Civil War.[70] Banks are chartered by either the federal government or the various states.[71] In theory, the federal government could entirely preempt the regulation of

67. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 530-31 (98th ed. 1977) (tables 851 & 853); SECTION OF CORPORATION, BANKING AND BUSINESS LAW, ABA, HANDBOOK OF SAVINGS AND LOAN LAW 5 (1973) (savings and loan associations are nation's largest real estate lenders). There are other federally chartered financial institutions. *E.g.*, 12 U.S.C. ch. 14 (1976) (federal credit unions).

68. The discussion of state regulation is not exhaustive. For example, it omits those areas in which Congress has specifically incorporated state law into federal law as the standard for federally chartered institutions. *See, e.g.*, 12 U.S.C. §§ 36(c) (branch banking), 85 (interest rates), 92a (trust powers) (1976). These areas, especially branch banking and interest rates, generate a large number of cases, but they are not treated in this comment because of the absence of an incorporation of state law in the area of mortgage discrimination or redlining. For general discussions of the dual banking system, see Hackley, *Our Baffling Banking System*, (parts 1 & 2), 52 VA. L. REV. 565, 771 (1966); Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1 (1977); *Symposium—Banking Regulation*, 31 LAW & CONTEMP. PROB. 635 (1966).

69. Fahey v. Mallonee, 332 U.S. 245, 250 (1947). Federal savings and loan associations have been described as regulated "from [their] cradle to [their] corporate grave." California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 316 (S.D. Cal. 1951).

70. Act of Feb. 25, 1863, ch. 58, 12 Stat. 665 (repealed by 1864 Act); Act of June 3, 1864, ch. 106, 13 Stat. 99 (current version in scattered sections of 12 U.S.C., principally 12 U.S.C. §§ 21-221 (1976)). The continuance of the dual banking system was unintended. The sponsors of the national system expected that state banks would cease to exist and that the national system (centrally and uniformly regulated) would take its place. *See, e.g.*, W. O'CONNER, THE LAW OF NATIONAL BANKING 26 (1941); Hackley, *supra* note 68, at 571-73; Scott, *supra* note 68, at 9. Such an intention on the part of the framers of the national banking system makes more plausible the argument that national banks should be governed exclusively by federal regulation.

71. Banks chartered by the federal government are organized under the national banking laws and subject to regulation by the federal banking agencies. Banks chartered

national banks either by detailed congressional legislation or by the development of a federal common law in the courts.[72] The actual course of development, however, has left much regulation to state law. The test, as expressed by the Supreme Court in *Anderson National Bank v. Luckett,* is that "national banks are subject to state laws unless those laws infringe the national banking laws or impose an undue burden on the performance of the banks' functions."[73]

As *Anderson* indicates, the traditional understanding is that limitations on state regulation of national banks derive from two sources. One source is the preemption of state law-making power by federal legislation governing national banks. Under the preemption doctrine, federal law overrides any state law which conflicts with federal law or infringes upon an area covered by federal law. The other source is the status of national banks as instrumentalities of the federal government insofar as they are used to perform certain governmental functions.

1. The basic test: preemption rationale

The test under the preemption rationale turns upon whether a state law conflicts with or is precluded by federal law. This may occur in a variety of situations. A state law will be held invalid: (1) where Congress has acted in a field in which the federal interest is so dominant that the federal system will be assumed to preclude state laws on the same subject;[74] (2) where a scheme of federal regulation is so pervasive as to imply that Congress left no room for state regulation;[75] (3) where state law produces a result inconsistent with the objectives of federal law;[76] or (4) where state law actually conflicts with federal law.[77] The preemption rationale thus depends on the existence of a

by a state are organized under that state's laws and subject to regulation principally by state banking authorities. State banks are subject to a certain measure of federal regulation if they are member banks of the Federal Reserve System, as some are, or if they insure their deposits through the Federal Deposit Insurance Corporation, as most do. *See* Scott, *supra* note 68, at 3-7. *See generally* Hackley, *supra* note 68; Wille, *State Banking: A Study in Dual Regulation,* 31 LAW & CONTEMP. PROB. 733 (1966).

72. *See, e.g.,* Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943).

73. 321 U.S. 233, 248 (1944). Similar language was used shortly after the inception of the national banking system. *See* National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869).

74. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

75. *Id.* These first two formulae comprise the so-called "occupation of the field" or preclusion variety of preemption.

76. *Id.*

77. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 141 (1963) (dictum). The latter two formulae are the conflict or supersession variety of preemption.

particular federal statute, the scope of that statute, and congressional intent regarding the statute. When a particular state statute concerns a subject matter intended by Congress to be within exclusive federal authority, the preclusion variety of preemption is involved. When a state statute conflicts with a federal law, preemption by supersession is involved. Specific language of regulatory statutes narrows a court's discretion, and predictability of result is thus enhanced.

Congressional intent is thus crucial in a finding of preemption.[78] Only recently, however, has Congress begun to state expressly its intention with regard to the effect of specific statutes on state laws.[79] The basic federal banking laws, generally from the nineteenth century,[80] are silent on preemption. The modern position is to presume that, absent express language to the contrary, congressional action in a field is not intended to preempt state law-making power so long as the latter is not inconsistent with federal law.[81]

The Supreme Court's national banking opinions do not adequately develop the preemption rationale in the bank regulation context.

See generally Ray v. Atlantic Richfield Co., 435 U.S. 151, 156-57 (1978) (survey of the preemption doctrine).

78. The question of congressional purpose is twofold: first, what Congress intended to accomplish by the law (its scope and objectives); and, second, whether and to what extent Congress intended the law to prevent state regulation in the area.

79. *See, e.g.*, Equal Credit Opportunity Act, 15 U.S.C. § 1691d(f) (1976) (*see* note 132 *infra*); Home Mortgage Disclosure Act, 12 U.S.C. § 2805 (1976) (*see* note 131 *infra*).

80. *See* note 70 *supra*.

81. *See* De Canas v. Bica, 424 U.S. 351, 357 (1976) (clear and manifest purpose of Congress to oust state power completely, "including state power to promulgate laws not in conflict with federal laws," must be demonstrated); New York Dep't of Social Services v. Dublino, 413 U.S. 405, 413-14 (1973); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) (federal regulation not to be deemed preemptive of state regulatory power unless the nature of the regulated subject matter permits no other conclusion or Congress has unmistakably so ordained). *See generally* Morris, *Constitutional Preemption of State Laws against Massive Oil Spills*, 1 U. PUGET SOUND L. REV. 73, 83-97 (1977); Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975). *See also* Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515 (survey of federal preemption doctrine prior to most recent Court developments).

The opposite presumption, namely, that congressional action in a field is intended to be preemptive in the absence of saving language, has sometimes been advanced. Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947); Cloverleaf Butter Co. v. Patterson, 315 U.S. 148 (1942). *See* Morris, *supra* at 89-91 (discussing cases of the 1940's-1960's). The FHLBB's view of the scope of its authority over federal saving and loan associations and of the inability of the states to regulate federally chartered associations in any manner seems to be founded upon the latter presumption. *See* note 85 *infra*. *See also* note 64 *supra* and notes 116-125 and accompanying text *infra* (cases adopting view similar to FHLBB's).

Even in relatively recent cases, the Court has limited its discussion to the particular facts and statutes involved and refrained from dealing with preemption in general.[82] The banking cases do, however, establish certain minimal propositions. Where state law actually conflicts with federal banking law, federal law prevails.[83] Similarly, a state law may not be applied to a national bank when federal regulation of a particular banking area is so extensive that it may be inferred that the federal law is intended to be exclusive in that area.[84]

Absent a clear expression of congressional intent, however, the extent of preemption is uncertain. Although the national character of federally chartered financial institutions creates a context in which joint regulation may be less appropriate,[85] the modern trend of the

82. *See, e.g.*, First Agricultural Nat'l Bank v. State Tax Comm'n, 393 U.S. 339 (1968) (state sales and use tax not applicable to purchases by national bank); Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954); Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) (state escheat law validly applicable to abandoned deposits in national bank).

83. Davis v. Elmira Sav. Bank, 161 U.S. 275, 283–84 (1896). The *Davis* Court held that a federal law mandating that creditors of insolvent national banks be paid ratably out of assets conflicts with and therefore supersedes state law giving preference to state savings banks with deposits in insolvent banks. The conflict between federal and state law may be indirect or implied as well as direct. Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954). At issue in *Franklin* was whether a New York law which allowed only state chartered mutual savings banks to use the words "saving" or "savings" in advertising. National banks, as well as state commercial banks, were purportedly prohibited from using these words in their advertisements. The national banking laws empower national banks to accept savings deposits. 12 U.S.C. § 24 (Seventh) (1976). They also authorize the use of "all such incidental powers as shall be necessary to carry on the business of banking." *Id.* The Court held that implied in the power to accept deposits is the incidental power to tell the public of that fact, *i.e.*, to advertise it. 347 U.S. at 376, 377–78. Therefore the restriction in the New York law conflicted with a power granted by Congress, and federal law prevailed. *Id.* at 378–79.

84. Easton v. Iowa, 188 U.S. 220, 231–32, 237 (1903). There, Congress had dealt directly with the insolvency of national banks with a comprehensive scheme, and the policies expressed in the federal scheme could not be overridden or supplemented by state law.

85. *See* notes 92 & 116–24 and accompanying text *infra*. The language in some national bank cases, if taken at face value, might be taken to indicate a lesser role for state regulation.

The National Bank Act has been described as "constituting by itself a complete system for . . . national banks." Cook County Nat'l Bank v. United States, 107 U.S. 445, 448 (1882). Since national banks are created by the central government as a means to achieve certain federal ends, "the States can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit." Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 34 (1875). The theme is that federal legislation on national banks "has in view the erection of a system extending throughout the country, and independent, so far as the powers conferred are concerned, of state legislation, which, if permitted to be applicable, might impose limitations and

preemption doctrine has been toward joint regulation.[86]

2. *The basic test: instrumentality rationale*

The instrumentality rationale was first developed in the landmark case of *McCulloch v. Maryland*, which involved the Second Bank of the United States.[87] After holding that Congress had the power to charter a bank as a necessary and proper means to carry out expressly authorized constitutional powers,[88] Chief Justice Marshall declared that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the con-

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restrictions as various and numerous as the States." Easton v. Iowa, 188 U.S. 220, 229 (1903).

If a uniform system were the overriding concern of federal legislation, however, then exceptions permitting the application of state law should be held to a minimum and should be traceable directly to some specific congressional authorization. The scope of allowable state regulation would be restricted to those areas where Congress has clearly so indicated. The paradigm case is congressional incorporation of state law into federal law. *E.g.*, 12 U.S.C. §§ 36(c) (branch banking), 85 (interest rates), 92a (trust powers) (1976). But the Court has not adopted such a standard. It has instead left many areas to the states. *E.g.*, National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 362 (1869) (national banks "are subject to the laws of the State, and are governed in their . . . business far more by the laws of the State than of the nation"). Accordingly, a state law cannot be invalidated merely by invoking the concept of an uniform national banking system, since that concept is not unqualified.

The FHLBB has nevertheless asserted such a theory for federal savings and loan associations. The FHLBB maintains that federal savings and loan associations are exclusively regulated by federal authority (the FHLBB) and that state laws are effective against federal associations only if federal law expressly incorporates them. Opinion Letter of Daniel Goldberg, Acting General Counsel, Federal Home Loan Bank Board (March 21, 1977), *reprinted in* 43 LEGAL BULL. 140, 141 (May 1977) (regarding New Jersey's mortgage disclosure law); Opinion Letter from Daniel Goldberg, Acting General Counsel of the FHLBB, to Robert L. Shults, President, Washington Savings League, at 2 (July 22, 1977) (copy on file with *Washington Law Review*); Amicus Curiae Brief of the Federal Home Loan Bank Board at 10, Glen Ellyn Sav. & Loan Ass'n v. Tsoumas, 71 Ill. 2d 493, 377 N.E.2d 1 (1978), *cert. denied*, 99 S. Ct. 311 (1978). *But see* note 64 *supra* & notes 116-24 and accompanying text *infra*.

86. *See* note 81 and accompanying text *supra*. *See also* Morris, *supra* note 81, at 91-97.

87. 17 U.S. (4 Wheat.) 316 (1819). The state act in *McCulloch* amounted to a direct challenge of the Second Bank of the United States. Maryland attempted to levy a tax on the Bank's notes without levying the tax on the notes of state chartered banks. The Second Bank of the United States was clearly a federal instrumentality. The federal government owned twenty percent of its stock and appointed twenty percent of its directors; the Bank was the only congressionally chartered bank during its life; it acted as the depository for government funds and as the government's fiscal agent. Act of April 10, 1816, ch. 44, 3 Stat. 266. See *also* P. STUDENSKI & H. KROOSS, FINANCIAL HISTORY OF THE UNITED STATES 83-88 (1st ed. 1952).

88. 17 U.S. (4 Wheat.) at 407-12.

stitutional laws enacted by Congress to carry into execution the powers vested in the general government."[89]

Although national banks differ significantly from the Second Bank of the United States,[90] the Court early held that national banks had federal instrumentality status[91] because under the National Banking Acts they were still to be used to accomplish certain governmental objectives.[92] Because the banks are private in character and serve only a limited government function, their protection from state regulation is commensurately limited: they are exempted from state legislation only so far as the legislation interferes with or impairs the banks' performance of the functions which the federal government requires of them.[93]

The Supreme Court has failed to clarify, however, when a state law so interferes with the performance of a federal function that it cannot

89. *Id.* at 436. *See also id.* at 432–33.

90. Unlike the Second Bank of the United States, modern national banks are numerous and completely privately owned and operated. *See also* note 92 *infra*.

91. Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29, 33–34 (1875); National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353, 361 (1869).

92. The primary government functions the national banks were meant to serve included issuing circulating bank notes (based on government bonds) in order to provide a reliable and uniform currency, acting as depositories for public funds, and acting as the government's fiscal agent. W. O'CONNOR, *supra* note 70, at 26; P. STUDENSKI & H. KROOSS, *supra* note 87, at 154–55, 178–79. The most important of these was issuance of the bank notes intended to serve as the national currency. The national banking system served these roles from its creation during the Civil War until the establishment of the Federal Reserve System in 1913. *See* Federal Reserve Act of 1913, 38 Stat. 251 (current version at 12 U.S.C. ch. 3 (1976)). The development of the Federal Reserve has drastically changed the relationship between national banks and the federal government. National banks no longer issue currency. P. STUDENSKI & H. KROOSS, *supra* note 87, at 393. The Federal Reserve Banks now hold the government's principal accounts and act as the government's fiscal agents. Thus, national banks no longer serve their traditional quasi-governmental roles. Some argue that, therefore, national banks should no longer have federal instrumentality status. *See* notes 96–97 *infra*.

National banks do, however, perform several indirect functions, principally implementation of monetary policy. National banks are required to become members of the Federal Reserve System; state banks may join voluntarily. The Federal Reserve Board controls money supply by operations to alter the reserve levels of member banks. P. SAMUELSON, ECONOMICS 318–22 (9th ed. 1973). These functions do not seem comparable to the former functions of national banks for purposes of conferring federal instrumentality status. If a role in monetary policy makes national banks federal instruments, then state member banks should similarly qualify. *But see* Schwind & O'Leary, *Are National Banks Federal Instrumentalities Today?*, 86 BANKING L.J. 99, 102–103 (1969) (discussing other lesser federal policies in which national banks have some part and arguing that these are adequate to confer instrumentality status).

93. National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869). This case first laid down the principle that national banks, in the greater part of their dealings, would

constitutionally be applied to national banks.[94] Such lack of guidance

be subject to state laws.

> [National banks] are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional.

Id. at 362.

94. Although the federal instrumentality formula is often repeated, *see, e.g.*, Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 248 (1944); McClellan v. Chipman, 164 U.S. 347, 356-57 (1896), it appears that the preemption rationale has been the true ground of decision. The instrumentality doctrine was used as the basis of decision only in the cases involving state taxation of the Second Bank of the United States, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Osborn v. United States Bank, 22 U.S. (9 Wheat.) 738 (1824). The Bank's clear status as a federal agent, the absence of federal legislation on point, and the unabashedly discriminatory nature of the state tax, however, made the outcome clear and distinguishes those cases from present ones.

The first case to discuss the extent of permissible state regulation of national banks involved a specific banking statute. National Bank v. Commonwealth, 76 U.S. (9 Wall.) 353 (1869), construing Act of June 3, 1864, ch. 106, § 41, 13 Stat. 111 (current version at 12 U.S.C. § 548 (1976)). The Court held that a Kentucky tax on bank shares was permitted under federal law, even though the tax was initially payable by the bank's cashier, because ultimately the tax was on the shareholder, not on an activity of the bank, the bank being used merely as a collection device. In Farmers' & Mechanics' Nat'l Bank v. Dearing, 91 U.S. 29 (1875), the Court held federal law controlled in a conflict with a New York statute regarding the penalty for usurious interest. *Id.* at 35-36.

A New York statute giving state savings banks which had deposited money in a state or national commercial bank a preference on the insolvency of the depository bank was challenged as to national banks in Davis v. Elmira Sav. Bank, 161 U.S. 275 (1896), as conflicting with the Act of June 3, 1864, ch. 106, § 50, 13 Stat. 114 (current version at 12 U.S.C. § 194 (1976)). The federal law required that creditors of insolvent national banks be paid ratably without preferences. The Court found a direct conflict between the two banking laws and declared the state law invalid. 161 U.S. at 283-84. On the other hand, a Massachusetts law which voided transfers of property in contemplation of bankruptcy for the purpose of creating a preference was upheld in McClellan v. Chipman, 164 U.S. 347 (1896). It was argued that this infringed the national bank's federally granted powers to make loans and to hold property conveyed as security for previous debts under the Act of June 3, 1864, ch. 106, §§ 8, 9 (current version at 12 U.S.C. §§ 24, 29 (1976)). The Court found no conflict. 164 U.S. at 358. *See also* note 103 and accompanying text *infra*.

In cases involving state escheat laws, the Court's discussion focused not on impairment in attaining the goals of the national banking system, but on whether the escheat law infringed the bank's statutory powers. Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) (state escheat law is applicable); First Nat'l Bank v. California, 262 U.S. 366 (1923) (state escheat law not applicable to national banks). *See* note 103 and accompanying text *infra*. The issue was whether the escheat of deposits to the state was inconsistent with a broadly described power to receive deposits, 12 U.S.C. § 24 (Seventh) (1976), and duty to repay them. *See* First Nat'l Bank v. California, 262 U.S. at 369-70.

Franklin Nat'l Bank v. New York, 347 U.S. 373 (1954) (discussed at note 83 *supra*), and Easton v. Iowa, 188 U.S. 220 (1903) (discussed at note 84 *supra*), were similarly decided on preemption, not instrumentality, grounds.

gives the instrumentality rationale an indeterminate scope, resting on judicial conclusions about what is necessary to achieve the goals of the national banking system and what constitutes an undue burden or causes unacceptable inefficiency.[95] Moreover, some courts[96] and commentators[97] have argued that national banks are no longer federal instrumentalities and should not be immune from state laws on that ground.[98] Since the instrumentality rationale is no longer clearly sup-

95. Scott, *supra* note 68, at 17–18. The importance of the instrumentality rationale may well lie in its potential ability to protect national banks from state interference in the absence of a specific federal statute.

96. In cases involving the application of state sales and use taxes to purchases by national banks, the highest courts of Massachusetts and New York held that the taxes could be validly applied. The courts reasoned that national banks were no longer federal instrumentalities and thus were without immunity from state taxes on that basis and that the federal statute on state taxing power was silent on the point, and so did not preempt state law. First Agricultural Nat'l Bank v. State Tax Comm'n, 229 N.E.2d 245 (Mass. 1967), *rev'd*, 392 U.S. 339 (1968); Liberty Nat'l Bank & Trust Co. v. Buscaglia, 21 N.Y.2d 357, 235 N.E.2d 101, 288 N.Y.S.2d 33 (1967), *appeal dismissed*, 393 U.S. 929 (1968), *rev'd*, 23 N.Y. 2d 933, 246 N.E.2d 361, 298 N.Y.S.2d 513 (on reargument after the Supreme Court's decision in *First Agricultural*), *cert. denied*, 396 U.S. 941 (1969).

The United States Supreme Court reversed *First Agricultural* but expressly chose not to address the federal instrumentality question. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. 339, 341 (1968). *See generally* Note, *State Taxation of National Banks: Federal Immunity of National Banks Survives Transformation of Banks' Functions*, 1969 UTAH L. REV. 352. The Court in the 5–3 decision held that the federal statute on state taxation of national banks in effect at that time, 12 U.S.C. § 548 (1964) (amended 1969) (current version at 12 U.S.C. § 548 (1976)), was exhaustive in its listing of the ways a state could tax national banks. Sales and use taxes were not mentioned. The dissenters argued both a different interpretation of the statute and that national banks are no longer federal instrumentalities. The dissenters further suggested that the protection of national banks from state regulation was better done by Congress or, if by the Court, then only to provide protection from discriminatory state laws. First Agricultural Nat'l Bank v. State Tax Comm'n, 392 U.S. at 349–52 (Marshall, J., dissenting).

Congress responded to *First Agricultural* by amending 12 U.S.C. § 548 so that states may tax national banks in whatever ways state banks in the state are taxed. Act of Dec. 24, 1969, Pub. L. No. 91–156, 83 Stat. 434 (1970) (codified at 12 U.S.C. § 548 (1976)).

97. *See, e.g.*, G. GUNTHER, CONSTITUTIONAL LAW 111 & 384–85 (9th ed. 1975); Note, *Constitutional Law—State-Federal Relations—State Sales and Use Taxes Can Be Levied on National Banks*, 81 HARV. L. REV. 1576 (1968). *But see* Schwind & O'Leary, *supra* note 92.

98. Underlying the criticism of the federal instrumentality rationale is, perhaps, a recognition of the vast change in the amount of federal statutes and regulations governing national banks. In the nineteenth century there was a relatively small amount of federal legislation; accordingly, there was at least more potential need for a federal instrumentality rationale to protect national banks. Today there is an ever increasing quantity of federal legislation, rules, and regulations, and a better machinery (the regulatory agencies) to make detailed provisions. Therefore, there is less need for the instrumentality rationale as the preemption rationale becomes more applicable.

ported by the case holdings[99] and its theoretical basis is open to serious question,[100] it is preferable to analyze state regulation of federal financial institutions predominantly in terms of preemption.

3. *Other themes*

In addition to the foregoing basic principles, the Supreme Court has developed several subordinate themes in conjunction with the basic test.[101] These themes include: (1) a distinction between general and specific state laws, (2) a distinction between discriminatory and nondiscriminatory state laws, and (3) the doctrine of competitive equality between national banks and state banks.

The Court has distinguished state laws of general application incidentally affecting banks from state laws specifically regulating banking. The former are more likely than the latter to be constitutionally applicable to national banks.[102] This distinction is based on the assumption that a general state law usually will involve some area traditionally subject to state power and that the incidental effect upon a national bank in one instance does not derogate the state's power over that area.[103]

99. *See* note 94 *supra*.

100. *See* note 92 *supra*.

101. Although the Court has frequently reiterated the basic test, it has done so with little discussion or elaboration. *See, e.g.*, Davis v. Elmira Sav. Bank, 161 U.S. 275, 283 (1896) (the basic principles are "axiomatic").

102. *Cf.* Easton v. Iowa, 188 U.S. 220, 239 (1903) (distinguishing general criminal laws of state applicable to all persons within jurisdiction from special laws making criminal certain acts committed by banking officers).

103. Easy examples are building and safety codes. Loosely speaking, in such instances the state is not asserting a power over the bank *qua* bank. For example, in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944), the issue was the power of a state to escheat presumptively abandoned deposits in national banks within the state. The bank argued that this infringed the bank's power to accept deposits under the Act of June 3, 1864, ch. 106, § 8, 13 Stat. 101 (current version at 12 U.S.C. § 24 (Seventh) (1976)). The Court viewed bank accounts as part of the property within a state traditionally subject to state control of transfer and devolution. 321 U.S. at 248. The state statute regulated the devolution of property and was not an assertion of power by the state over national bank deposits. The statute devolved the account to the state, and then the state as depositor demanded payment from the bank. *Id.* at 248–49. Application of the law to national banks was therefore upheld. *Anderson* was followed in Roth v. Delano, 338 U.S. 226, 230 (1949) (escheat of unclaimed dividends), and in Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951). *But see* First Nat'l Bank v. California, 262 U.S. 366 (1923) (similar law of escheat of abandoned deposits held invalid). The *Anderson* Court distinguished *First Nat'l Bank v. California* by differences in terms of the statutes.

Subjecting national banks to a Massachusetts statute restricting real estate transfers was challenged on the grounds that it impaired the banks' statutory powers to make loans and to secure previous debts with real property. McClellan v. Chipman, 164 U.S.

The Court has also noted a distinction between state laws which are discriminatory, applying only to national banks, and those which are nondiscriminatory, applying to both state and national banks.[104] The fact that a state law is applied to state as well as national banks supports the validity of the law.[105] State statutes which apply only to national banks are unlikely to be concerned with the regulation of banks for the public welfare since state banks are not required to comply. Rather, their purpose frequently is to hamper the operations of national banks and perhaps keep them out of the state.[106] *McCulloch v. Maryland* involved such a discriminatory statute, and the Court promptly struck it down.[107]

Recently the Court has emphasized the policy of competitive equality between national banks and state banks.[108] The powers and re-

347 (1896). The Massachusetts statute rendered void a conveyance or pledge of property made by a person insolvent or in contemplation of insolvency to a creditor within six months before filing a petition in bankruptcy, if the transferee creditor knew of the impending insolvency and if the purpose of the transfer was to give the creditor a preference. In *McClellan* a creditor national bank had so received property. The Court upheld the state statute, finding no conflict with federal law and no impairment of bank efficiency. *Id.* at 358, 361. Central to the Court's reasoning was that most contracts and dealings of national banks are governed by general state laws and that the statute under challenge subjected national banks to the same conditions regarding real estate transfers as other citizens of the state. *Id.* at 357–58, 361. *Cf.* Davis v. Elmira Sav. Bank, 161 U.S. 275, 290 (1896) (New York law which was found invalid as conflicting with federal law specifically concerned banks, *see* note 94 *supra*).

104. *See, e.g.*, Easton v. Iowa, 188 U.S. 220, 227 (1903). The Iowa statute made it a criminal offense for a bank officer to accept deposits, knowing the bank was insolvent. *See* note 84 *supra*. The Iowa law was, in fact, nondiscriminatory, 188 U.S. at 227, but was found invalid on preemption grounds. The discriminatory application distinction and the general/specific distinction are often discussed together. *See, e.g.*, David v. Elmira Sav. Bank, 161 U.S. 275, 290 (1896); McClellan v. Chipman, 164 U.S. 347, 360–61 (1896).

105. *See, e.g.*, Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 247 (1944) (that state escheat law did not discriminate against national banks but required both state and national banks to pay escheated accounts to state contributed to validity of state law).

106. Such action by a state would arguably be in conflict with federal law authorizing national banks to exist and do a banking business. 12 U.S.C. §§ 21, 24 (1976).

107. 17 U.S. (4 Wheat.) at 319. *See* note 87 *supra*. Note that the Maryland law would have undermined the competitive position of the Second Bank of the United States and was both clearly discriminatory and directed against the bank's operation as a bank.

108. First Nat'l Bank v. Dickinson, 396 U.S. 122, 131–32 (1969), *rehearing denied*, 396 U.S. 1047 (1970) (branching); First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252, 257–61 (1966), *rehearing denied*, 385 U.S. 1032 (1967) (branching). *See also* Dakota Nat'l Bank & Trust Co. v. First Nat'l Bank & Trust Co., 554 F.2d 345, 353–55 (8th Cir.), *cert. denied*, 434 U.S. 877 (1977); St. Louis County Nat'l Bank v. Mercantile Trust Co., 548 F.2d 716, 720 (8th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977); Independent Bankers Ass'n v. Smith, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S.

strictions of national banks and state banks should be such that neither is at a competitive disadvantage in the marketplace of an individual state.[109] The policy of competitive equality originated as a basis for the branching provisions of federal banking law which give national banks the same power to establish branches as state banks enjoy.[110] The courts have indicated some willingness to extend the principle beyond the area of branching.[111] Extension is reasonable where, as in branching, Congress has expressly incorporated state law into the national banking laws,[112] since the purpose of such incorporation is to achieve intrastate uniformity in the regulation of national and state banks in the areas covered.[113]

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862 (1976). *But see* Scott, *supra* note 68, at 41-42 (criticism of competitive equality as a misconception even in branch banking in which the doctrine was first developed).

109. *Cf.* Franklin Nat'l Bank v. New York, 347 U.S. 373, 375 (1954) (Congress expanded powers of national banks to keep them from being at a disadvantage against state chartered banks).

110. First Nat'l Bank v. Walker Bank & Trust Co., 385 U.S. 252 (1966), *rehearing denied*, 385 U.S. 1032 (1967) (construing 12 U.S.C. § 36(c)). The federal statute provides that national banks may establish and operate new branches if the law of the state where the national bank is sited authorizes state banks to do so. 12 U.S.C. § 36 (1976). In *Walker Bank* the issue was the extent to which state branching law was incorporated into federal law. Utah allowed branching but only by means of taking over an existing operation of another bank. From the legislative history of the branching provisions, the Court found that Congress, in order to place national banks and state banks on an equal competitive basis, intended that national banks be able to branch to the same extent as state banks in the location state were. 385 U.S. at 257-61.

The final result in the branching cases has been that state law is incorporated in determining whether, where, when, and how branching is allowed for national banks, but the question of what constitutes a branch is a matter for federal common law under 12 U.S.C. § 36(f). First Nat'l Bank v. Dickinson, 396 U.S. 122, 130, 133-34 (1969), *rehearing denied*, 396 U.S. 1047 (1970); *Walker Bank*, 385 U.S. at 261-62.

111. "The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system." First Nat'l Bank v. Dickinson, 396 U.S. 122, 133 (1969), *rehearing denied*, 396 U.S. 1047 (1970) (dictum). Similar broad dictum appeared in Independent Bankers Ass'n v. Smith, 534 F.2d 921, 932 (D.C. Cir.), *cert. denied*, 429 U.S. 862 (1976). The Eighth Circuit has extended competitive equality beyond branching. St. Louis County Nat'l Bank v. Mercantile Trust Co., 548 F.2d 716, 720 (1976), *cert. denied*, 433 U.S. 909 (1977) (trust powers under 12 U.S.C. § 92a (1976)). However, some would restrict the principle of competitive equality to branch banking. First Nat'l Bank v. Dickinson, 396 U.S. 122, 139 (1969), *rehearing denied*, 396 U.S. 1047 (1970) (Douglas, J., dissenting) (quoting *Walker Bank* and emphasizing that application in that case was limited to branch banking).

112. *E.g.*, 12 U.S.C. §§ 24 (Eighth) (charitable contributions), 85 (interest rates), 90 (security for deposits of state funds), 92a (trust powers) (1976).

113. *See* notes 109-10 and accompanying text *supra*. *See also* Scott, *supra* note 68, at 37.

B. Federal Savings and Loan Associations

There is less authority concerning state regulation of federal savings and loan associations than state regulation of national banks.[114] Federal savings and loan associations, like national banks, have been declared to be federal instrumentalities[115] but are distinguished from national banks with regard to the scope of the states' authority to regulate them.[116]

Lower federal court opinions occasionally assert that, because Congress has delegated authority to the Federal Home Loan Bank Board (FHLBB) to make all necessary rules to govern federal savings and loan associations,[117] the regulation of federal associations has been federalized completely, leaving no room for state control.[118] But this argument is neither carefully considered nor, in this broad form, required by the cases in which it appears. Those cases have involved internal operational affairs of federal savings and loan associations,[119]

114. There are, for instance, no Supreme Court cases. Of course the limits of state regulation of national banks, while more articulated than those of federal savings and loan associations, are also inadequately developed. Federal savings and loan associations are thrift institutions organized under the Federal Home Owners' Loan Act of 1933, 12 U.S.C. ch. 12 (1976).

115. *See, e.g.*, United States v. Harper, 241 F.2d 103, 105 (7th Cir. 1957); Durnin v. Allentown Fed. Sav. & Loan Ass'n, 218 F. Supp. 716, 718 (E.D. Pa. 1963). Federal savings and loan associations, however, are federal instrumentalities only to a limited extent. Gibson v. First Fed. Sav. & Loan Ass'n, 347 F. Supp. 560, 563 (E.D. Mich. 1972).

116. *E.g.*, Lyons Sav. & Loan Ass'n v. Federal Home Loan Bank Board, 377 F. Supp. 11, 17 (N.D. Ill. 1974). "As to national banks, Congress expressly left open a field for state regulation and the application of state laws [citing no authority]; but as to federal savings and loan associations, Congress made plenary, preemptive delegation to the Board to organize, incorporate, supervise and regulate, leaving no field for state supervision." California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 319 (S.D. Cal. 1951). The *Coast Federal* court gives no authority for this statement. The "plenary, preemptive delegation" in the case of federal savings and loan associations is inferred from 12 U.S.C. § 1464(a) (1976) (quoted at note 117 *infra*). This interpretation is contrary to the modern view that joint regulation is presumed unless Congress expressly states its preemptive intent. *See* note 81 *supra* and notes 121 & 124–25 and accompanying text *infra*.

117. "[T]he Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations. . . .'" 12 U.S.C. § 1464(a) (1976).

118. *E.g.*, Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n, 499 F.2d 1145 (9th Cir. 1974); Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 823 (N.D. Ill. 1975); Elwert v. Pacific First Fed. Sav. & Loan Ass'n, 138 F. Supp. 395, 399–400 (D. Ore. 1956); California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311, 318 (S.D. Cal. 1951).

119. Rettig v. Arlington Heights Fed. Sav. & Loan Ass'n, 405 F. Supp. 819, 823, 826 (N.D. Ill. 1975).

actual conflict between state law and an existent federal law or FHLBB regulation,[120] or preemption of a particular area by a federal regulatory scheme.[121]

There is, moreover, no basis in policy for federal savings and loan associations to be any more federalized than national banks. Indeed, if performance of a central government function is the *raison d'être* for uniform federal regulation and curtailment of state power, then national banks should be more federalized than federal savings and loan associations because of the banks' role in regulating money supply.[122] But it has long been established that national banks can be subject to state laws in appropriate circumstances.[123] The sounder position, therefore, is that the complete preclusive federalization of the regulation of federal savings and loan associations extends to the internal affairs of the associations, but that for external transactions, including nondiscrimination regulation, state law may apply to federal associations unless expressly preempted by federal laws or regulations.[124] Thus, the test for determining which state laws can be applied to federal associations is the same basic test used for national banks, allowing for differences between the federal laws governing

120. *E.g.*, California v. Coast Fed. Sav. & Loan Ass'n, 98 F. Supp. 311 (S.D. Cal. 1951).

121. *E.g.*, Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n, 499 F.2d 1145, 1146-47 (9th Cir. 1974) (preemption of field of prepayment of real estate loans to federally chartered savings and loan associations).

The "total federalization" view is contrary to the current presumption in the preemption doctrine that state laws in an area are to be upheld unless congressional intent to preempt is clear. *See* notes 64, 81 & 85 and accompanying text *supra*. Moreover, even if 12 U.S.C. § 1464(a) did evidence some general congressional preemptive intent, for areas covered by specific enactments such as the Equal Credit Opportunity Act, 15 U.S.C. § 1691 (1976), the specific form of preemption Congress expressed for that area may arguably control. The Equal Credit Opportunity Act's preemption provision, 15 U.S.C. § 1691d(f) (quoted at note 132 *infra*), is not in accord with the total federalization theory. Also, the total federalization theory has no obvious, inherent limitation. Under it, state and local building codes and even local zoning would apparently be inapplicable to federal savings and loan associations, unless the FHLBB consents to these local regulations.

122. *See* note 92 *supra*.

123. *See* notes 73-113 and accompanying text *supra*. In at least one case it has been recognized that FHLBB rules do not provide the sole method of regulating federal savings and loan associations. Beverly Hills Fed. Sav. & Loan Ass'n v. Federal Home Loan Bank Board, 371 F. Supp. 306, 313-14 (C.D. Cal. 1973) (transfer of control of association by controlling group in a manner not proscribed by specific FHLBB rule nevertheless held unlawful under federal common law).

124. *See generally* G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 11.6 at 692-95 (3d ed. 1979); Bartlett, *The Federal-State Preemption Conflict*, 44 LEGAL BULL. 1, 1-13 (1978).

national banks and those governing federal savings and loan associations.[125]

IV. THE VALIDITY OF WASHINGTON'S ANTI-REDLINING LAW

A. Mortgage Disclosure Provisions

Washington's Mortgage Disclosure Act[126] does not discriminate against federally chartered financial institutions in favor of state chartered institutions; nor does it put state chartered institutions in a superior competitive position.[127] Nevertheless, it is doubtful that the mortgage disclosure portions of the Washington law can be validly applied to federally chartered financial institutions. First, Congress has preempted the mortgage disclosure area. Second, the Washington act is an unauthorized exercise of visitorial powers by the state.

The HMDA[128] which directly addresses the area of mortgage disclosure contains a section detailing its relation to state laws. This section and its legislative history show Congress' intent to preempt state law-making power over federal financial institutions in this area. As finally adopted, the HMDA provides that state mortgage disclosure laws may continue to apply only to *state chartered institutions* and only to the extent those laws are not inconsistent with federal law.[129]

125. *Cf.* Meyers v. Beverly Hills Fed. Sav. & Loan Ass'n, 499 F.2d 1145, 1147 n.6 (9th Cir. 1974) (conflict between laws as related to extent of federal preemption). Because differences exist in federal law regarding national banks and federal savings and loan associations, it is possible that preemption of state law on a certain topic will be different for each institution and so the scope of permissible state regulation different. Further variations may stem from the fact that the governmental functions expected of the two institutions are different.

126. WASH. REV. CODE ch. 19.106 (Supp. 1977). *See* notes 23–30 and accompanying text *supra*.

127. The HMDA provides for exemption for state chartered institutions but not for federally chartered institutions. *See* notes 129–131 and accompanying text *infra*. Therefore, federal institutions would be required to compile two different sets of mortgage data, leaving aside the preemptive impact of the federal act on the state law, whereas state institutions need compile only one. The extra cost burden thereby created is probably not substantial enough to have an adverse impact on an institution's competitive position. In any event, the adverse impact on competitive equality is not produced by the terms of the state act.

128. 12 U.S.C. §§ 2801–2809 (1976). *See* notes 42–57 and accompanying text *supra*.

129. Since a state law may not be deemed inconsistent because it requires greater detail or otherwise requires greater disclosure, 12 U.S.C. § 2805(a) (1976), and an exemption from the federal act may be given if the state requirements are substantially similar to federal, *id.* § 2805(b), only weaker state laws are superseded with respect to

In such cases the state chartered institutions may be exempted from reporting under the federal act;[130] but federally chartered institutions cannot be exempted from the federal requirements.[131]

The original version of the exempting section was intended to include federally chartered institutions.[132] If it had passed, it would have required federal institutions to comply with appropriate state disclosure laws.[133] During floor debate, however, the House amended

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state chartered institutions. State laws as stringent or more stringent than the federal requirements continue, and by the exemption federal law is not applied. *See* notes 56 & 57 *supra*.

130. *See* note 57 *supra*.

131. The section of the HMDA concerning its relation to state laws provides, in relevant part, as follows:

> (a) This chapter does not annul, alter, or affect, or exempt any State chartered depository institution subject to the provisions of this chapter from complying with the laws of any State or subdivision thereof with respect to public disclosure and recordkeeping by depositor institutions, except to the extent that those laws are inconsistent with any provision of this chapter, and then only to the extent of the inconsistency. The Board is authorized to determine whether such inconsistencies exist. The Board may not determine that any such law is inconsistent with any provision of this chapter if the Board determines that such law requires the maintenance of records with greater geographic or other detail than is required under this chapter, or that such law otherwise provides greater disclosure than is required under this chapter.
>
> (b) The Board may by regulation exempt from the requirements of this chapter any State chartered depository institution within any State or subdivision thereof if it determines that, under the law of such State or subdivision, that institution is subject to requirements substantially similar to those imposed under this chapter, and that such law contains adequate provisions for enforcement.

12 U.S.C. § 2805 (1976).

132. H.R. 10024 § 306, 94th Cong., 1st Sess. (1975). *See also* H.R. CONF. REP. No. 94-726, 94th Cong., 1st Sess. 9, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2333, 2336. The significant change was that "any person" in the original version was replaced with "state chartered institution" in the final, enacted version. The language of the original version was based on similar provisions for the relation of federal to state laws in other federal consumer finance laws. For example, the Equal Credit Opportunity Act provides:

> This subchapter does not annul, alter, or affect, or exempt any person subject to the provisions of this subchapter, from complying with, the laws of any State with respect to credit discrimination, except to the extent that those laws are inconsistent with any provision of this subchapter, and then only to the extent of the inconsistency. . . . The Board may not determine that any State law is inconsistent with any provision of this subchapter if the Board determines that such law gives greater protection to the applicant.

15 U.S.C. § 169d(f) (1976).

133. The earlier House committee explanation stated:

> To insure compliance by Federal institutions with stricter state disclosure statutes, H.R. 10024 makes it clear that Federal institutions must comply with state law and regulations, even if it should be inconsistent with Federal law by requiring maintenance of records with greater geographic or other detail, or provide for greater dis-

the exempting section to apply only to state chartered institutions.[134] The conference committee report explaining the two positions and the reasons behind the House change clearly shows a congressional intent that federal financial institutions not be subject to state mortgage disclosure laws.[135] Thus, by enacting the House version, Congress intended to preempt the states from requiring federally chartered financial institutions to disclose mortgage lending statistics.[136] Therefore,

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closure than is required by Federal law.

H.R. REP. No. 94-561, 94th Cong., 1st Sess. 19, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2303, 2320-21.

134. Congressman Stephens, speaking for the sponsor of the amendment, explained the reasons for the change:

> [In the present House version] it is not clear whether State regulation will be adhered to or whether Federal regulation will be adhered to . . . if there is a difference between the State regulation and the Federal regulation.
>
> [Federal savings and loan associations] have always been regulated by the Federal Home Loan Bank Board. The Board says it is not clear whether that is to be continued or not. This is what the Board has asked to be done, and this is . . . why I offered the amendment. I will read from a letter of the Federal Home Loan Bank Board, as follows:
>
> > We are concerned that section 306 of title III could be construed to require Federal savings and loan associations to comply with public disclosure and record-keeping requirements imposed by State law. . . . Although it is not clear from a reading of section 306 that the section would subject Federal institutions to State law disclosure requirements, such an inference has been drawn by language in the House Banking Committee report. . . .
>
> That was not what was understood from the hearing as the intent of the committee.
>
> Mr. Chairman, this [amendment] would clarify that. That is all it does.

121 CONG. REC. 34,564 (1975) (printing error in Congressional Record has been corrected).

135. The conference report stated in part:

> The Senate's intent was to subject all depository institutions in a jurisdiction to the same mortgage disclosure law, whether State or Federal, depending on which offered a greater degree of disclosure of mortgage information.
>
> . . . The intent of the House provision is that in the area of public disclosure of mortgage lending statistics, this Act shall apply to all depository institutions unless an exemption is granted by the Board, in which case state-chartered institutions would be subject to the state or local law to the extent of the exemption, but Federally chartered institutions would continue to follow the requirements of this Act. The conferees understand that for the purposes of exemption authority granted to the Board, the term State law shall include State regulations which carry the force of law.
>
> The Senate conferees regard the House provision concerning Federal pre-emption as an exception to the pre-emption provisions of other consumer finance laws, including the Truth in Lending and the Fair Credit Billing Acts, which contain provisions similar to the Senate provisions of S. 1281.

H.R. CONF. REP. No. 94-726, 94th Cong., 1st Sess. 9-10, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2333, 2336.

136. *Id.* at 10, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS at 2336.

under the preemption rationale of the basic test discussed in Part III, Washington's mortgage disclosure law appears invalid as applied to federal institutions.[137]

It is a fundamental policy of the dual banking system that the sovereign which charters a financial institution is the authority which supervises and primarily regulates it.[138] In keeping with this policy, Congress has expressly provided that states have no rights of visitation over national banks except insofar as is vested in state courts.[139] Visitorial power is essentially the power to examine the records and look into the operations of an institution. This prohibition of state visitorial power has been interpreted to preclude state banking officials from inspecting or requiring the production of records of national banks.[140] The Washington act requires regular reports to state officials of all

137. The court in *Washington Savings League* recently held, with regard to federal savings and loan associations, that the state mortgage disclosure provisions are preempted by the HMDA. Order Granting Motions for Summary Judgment and Permanent Injunction at 2-3, Washington Sav. League v. Chapman, No. C 78-163S (W.D. Wash. Jan. 17, 1979). The preemption rationale is discussed at notes 73-86 and accompanying text *supra*. Since the authority granted by the HMDA will terminate in mid-1980, 12 U.S.C. §§ 2808-2809 (1976), it will be necessary to reevaluate federal preemption and the applicability of the Washington act according to federal laws and regulations in effect at that time. The Washington Mortgage Disclosure Act itself will expire on January 1, 1981. WASH. REV. CODE § 19.106.900 (Supp. 1977).

138. *See generally* Scott, *supra* note 68, at 5-6. Traditionally, state authorities supervise state chartered financial institutions; federal authorities supervise federally chartered ones. Through federal deposit insurance, federal savings and loan insurance, the federal reserve system, and similar federal programs, the federal government also exercises some control over most state chartered institutions.

139. 12 U.S.C. § 484 (1976) provides:

> No bank shall be subject to any visitorial powers other than such as are authorized by law, or vested in the courts of justice or such as shall be or shall have been exercised or directed by Congress, or by either House thereof or by any committee of Congress or of either House duly authorized.

Id. See also Guthrie v. Harkness, 199 U.S. 148, 158-59 (1905) (construing prior codification of 12 U.S.C. § 484 (1976) and explaining meaning of "visitorial powers"). The theoretical foundation for this policy—the sovereignty of the chartering government—applies equally to federal savings and loan associations. The federalization of the regulation of federal associations under 12 U.S.C. § 1464(a) extends at least as far as supervisory and visitorial rights, since actual regulations on these matters exist.

140. An interpretive ruling of the Comptroller's Office provides:

> The exercise of visitorial powers over national banks is vested in the Comptroller of the Currency. See 12 U.S.C. § 484. Other officials, including state banking officials, have no authority to conduct examinations or *to inspect or require the production of books or records of national banks*, except as authorized by law.

12 C.F.R. § 7.6025(b) (1978) (emphasis added). That the Washington law requires the reports go to the secretary of state rather than the state banking supervisor or savings and loan supervisor does not change the effect of this regulation. The reporting requirement is still a manifestation of supervision. *See* note 30 *supra*.

home mortgage lending operations within metropolitan areas.[141] The required reporting is not limited to investigation of specific complaints of redlining or specific neighborhoods where redlining is suspected.[142] Thus the reporting goes beyond merely providing a means of enforcing the Fairness in Lending Act.[143] The reporting requirement is an effort to monitor mortgage lending in general for purposes of gathering information on redlining and disinvestment. Such oversight of what a bank or savings and loan association is doing seems to fall under the prohibition against supervision.[144] Thus, the mortgage disclosure provisions of Washington's Financial Institutions Disclosure Act should also be declared invalid as an attempt to exercise unconstitutionally broad visitorial and supervisory powers over federally chartered financial institutions.

B. Fairness in Lending Provisions

The application of the Fairness in Lending Act portion of the Washington law,[145] which prohibits discrimination in lending based on the location of the mortgaged house, to federally chartered financial institutions is, however, more complicated than the application of the state mortgage disclosure provisions. The result is different for national banks than for federal savings and loan associations.

The Washington Fairness in Lending Act applies to federally and state chartered institutions equally.[146] It is a general state law, of which the primary purpose is to protect the rights of state residents rather than affect financial institutions.[147] With regard to national banks, there are as yet no federal laws or regulations in the area. The

141. WASH. REV. CODE § 19.106.030 (Supp. 1977) (annual reports to the secretary of state). *See* note 30 *supra*.

142. The reports must be made for every neighborhood wholly or partially in a SMSA. *Id.* For Washington that is all of King, Snohomish, Pierce, Yakima, Spokane, and Clark counties. *See* notes 24 & 25 *supra*.

143. Requiring reports from national banks to state officials when that is needed to enforce a valid state law was upheld in Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 252–53 (1944). *See* note 154 *infra*.

144. *See* notes 139 & 140 and accompanying text *supra*.

145. WASH. REV. CODE §§ 30.04.500–.515 (Supp. 1977). *See* notes 36–41 and accompanying text *supra*.

146. See notes 104–07 and accompanying text *supra* for a discussion of the distinction between discriminatory and nondiscriminatory state laws.

147. See notes 102 & 103 and accompanying text *supra* for a discussion of the distinction between specific and general state laws. In this respect the Fairness in Lending Act is analogous to the state escheat law in Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944).

law thus bears none of the indicia which have served to invalidate state laws regulating national banks in other contexts.

Moreover, the Fairness in Lending Act is not affected by the HMDA. The federal law deals only with mortgage disclosure, not with the prohibition of redlining. There was no congressional intent to preempt state antidiscrimination provisions. The HMDA's preemption provision is different from those of other federal consumer finance laws,[148] and the Senate conferees expressed their understanding that the unusual preemption provision of the HMDA "goes only to the narrow area of geographical disclosure of mortgage lending statistics."[149] Accordingly, Washington's Fairness in Lending Act is validly applicable to national banks.[150]

In the case of federal savings and loan associations, however, the FHLBB recently has issued specific nondiscrimination regulations which prohibit redlining and which explicitly state the Board's intent to preempt regulation of federal associations in this area.[151] Under

148. In general, in antidiscrimination or consumer protection laws in the financial area, federal laws permit state law to be effective where it is at least as strong as the federal law. *See, e.g.*, 15 U.S.C. §§ 1610, 1633, 1666j(a) (Fair Credit Billing Act), 1677, 1681t, 1691d(f) (Equal Credit Opportunity Act) (quoted in part at note 132 *supra*) (1976).

149. H.R. CONF. REP. No. 94-726, 94th Cong., 1st Sess. 10, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 2333, 2336. "In the case of mortgage disclosure, however, the conferees [on] the part of the House strongly believe that subjecting a Federally chartered institution to state law would threaten the dual banking system." *Id.* Arguably, the reason that subjecting a federally chartered financial institution to a state mortgage disclosure law is a threat to the dual banking system, whereas subjecting federal institutions to state nondiscrimination and consumer finance laws is not a threat, is the supervisory nature of requiring reports. *See* notes 132, 135, 138-44 and accompanying text *supra*.

150. A recent interpretive letter of the Comptroller's Office regarding the applicability of Michigan's anti-redlining law to national banks adopts a similar view. Comptroller Interpretive Letter No. 61 (Sept. 11, 1978), *reprinted in* [1978] FED. BANKING L. REP. (CCH) ¶ 85,136 (provisions prohibiting redlining discrimination applicable to national banks, but mortgage disclosure provisions preempted by HMDA).

151. 43 Fed. Reg. 22332-39 (1978) (final amendments to 12 C.F.R. Parts 528 & 531, effective July 1, 1978). *See* note 46 *supra*. The Bank Board's express intent to preempt state law is shown in its statement that "it is the Bank Board's intent that Federally-chartered savings and loan associations institutions shall be governed *solely* by [these federal regulations]." 43 Fed. Reg. 22333 (1978) (emphasis added). This statement raises two problems: (1) the source of the FHLBB's authority for this preemption and (2) the effect of these regulations on state chartered institutions.

These regulations are issued pursuant to several statutes. The scope of the FHLBB's authority and therefore of its power to preempt state law is different for each source. The regulations implement the Equal Credit Opportunity Act (ECOA), 15 U.S.C. §§ 1691-1691f (1976), the 1968 Fair Housing Act, 42 U.S.C. ch. 45 (1976), the 1866 Civil Rights Act, 42 U.S.C. §§ 1981-1982 (1976), and the various acts empowering the FHLBB to regulate the Federal Home Loan Banks, the Federal Savings and Loan In-

even the most limited modern presumption in the preemption doctrine,[152] a specific regulatory scheme with express preemptive intent must be held to preclude state regulation of the same area. Therefore, the Washington Fairness in Lending Act should be declared inapplicable to federal savings and loan associations.[153]

V. CONCLUSION

The Washington Fairness in Lending Act remains applicable to national banks but appears inapplicable to federal savings and loan associations. The state Mortgage Disclosure Act, in its present form, is

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surance Corporation (FSLIC), and federal savings and loan associations, 12 U.S.C. §§ 1437, 1464, 1725, 1726, 1730 (1976). *See* 12 C.F.R. Part 528 (1978) (authority note); 43 Fed. Reg. 22332 (1978).

The ECOA contains its own provision for preemption which states that a state law is not preempted when it gives greater protection than federal law. 15 U.S.C. § 1691d(f) (1978). *See* note 132 *supra*. Thus, for areas within ECOA, even though such areas may also be within the scope of the FHLBB's authority from another, less restrictive source, it might plausibly be argued that this specific statement of congressional intent for the role of state law in a certain area controls over the general, delegated power of the FHLBB to regulate federal associations. The areas within the ECOA for which this argument might be made are credit discrimination based on race, color, religion, national origin, sex, age, and marital status. Geographic redlining, however, is not covered by the ECOA.

The 1866 Civil Rights Act deals only with racial discrimination, and both the 1968 Fair Housing Act and the ECOA, insofar as they apply to redlining, deal only with racial discrimination. Thus, under these acts the FHLBB's power to prohibit redlining extends only to redlining with racially discriminatory effect or motivation, not to purely geographic redlining. And it is, moreover, not clearly the case that Congress intended these federal laws to exclude state civil rights laws.

In the final analysis, the FHLBB's power to prohibit geographic redlining and its power to preempt state law in the field are based on the general power of the FHLBB to supervise the federal savings and loan system and regulate it in the public interest. The Board has such general power, *see, e.g.*, 12 U.S.C. § 1464(a) (1976), and the Board's nondiscrimination regulations are unquestionably a proper exercise of that power.

The second problem raised by the Board's statement of preemption is that the Board limits the express preemption to federally chartered institutions, although the Board has the power to regulate state chartered savings and loan associations which are members of the federal savings and loan system, insured by the FSLIC. The apparent negative implication is that state savings and loan associations are not exclusively governed by these federal regulations and therefore state laws which are consistent with the federal regulations can apply to state savings and loan associations.

152. See note 81 and accompanying text *supra* for a discussion of recent trends in the preemption doctrine.

153. The court in *Washington Savings League*, on similar reasoning, recently did declare the Washington Fairness in Lending Act preempted by the FHLBB nondiscrimination regulations. Order Granting Motions for Summary Judgment and Permanent Injunction at 2-3, Washington Sav. League v. Chapman, No. C 78-163S (W.D. Wash. Jan. 17, 1979).

not applicable to any federally chartered financial institution. A less broad reporting measure, however, might be constitutionally applicable to some federal financial institutions. The present statute serves two purposes. First, it requires the accumulation of data on mortgage lending and will aid in determining whether and to what extent redlining and disinvestment exist in Washington. Second, it aids in enforcing the Fairness in Lending Act. Only the former requires comprehensive monitoring of lending which is tantamount to supervision and preempted by the HMDA. The latter purpose could be served by a more limited act, applicable to federal financial institutions subject to the Fairness in Lending Act.

Such an act would have two principal features. First, upon complaint of discrimination based on location, the federal financial institution in question would be required to turn over the applicant's mortgage file to appropriate state or local authorities for investigation. Second, after a number of complaints from one geographic area or upon some other showing of good cause, federal financial institutions would be required to make mortgage disclosure on terms similar to those in the present act, but only for the particular area in question.[154]

The present state disclosure law would, of course, continue to apply to all state chartered financial institutions. A revised act, limited to enforcement related disclosure from federal institutions subject to the Fairness in Lending Act would be useful and constitutionally valid but still not adequate. The need for data to monitor mortgage lending would persist because the coverage of the revised state act would be limited and because the information available under the HMDA is not sufficient.[155] An adequate state law cannot be applied because of the strong policy of federal regulation of federal institutions; therefore Congress must be convinced to strengthen federal law.

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154. Visitation problems should not defeat such a statute because requiring reports as the means of enforcing state law has been approved by the Supreme Court. Anderson Nat'l Bank v. Luckett, 321 U.S. 233, 252-53 (1944). "Since Kentucky may enforce its statute requiring the surrender to it of presumptively abandoned accounts in national as well as state banks, it may, as an appropriate incident to this exercise of authority, require the banks to file reports of inactive accounts, as the statute directs." *Id.*

Similarly, Congress' presumptive intent in the HMDA arguably goes only to the disclosure of comprehensive mortgage lending statistics. State requests for specific and limited mortgage information in connection with the enforcement of a valid state law in a particular case or area would not threaten the dual banking system.

155. *Compare* notes 51-53 and accompanying text *supra* (information required under Federal Home Mortgage Disclosure Act) *with* notes 31-35 and accompanying text *supra* (information required under Washington Mortgage Disclosure Act).